

1 CAITLIN SINCLAIRE BLYTHE (CA SBN 265024)
CBlythe@mofo.com
2 KAREN LEUNG (CA SBN 323029)
KLeung@mofo.com
3 MORRISON FOERSTER LLP
425 Market Street
4 San Francisco, California 94105-2482
Telephone: 415.268.7000
5 Facsimile: 415.268.7522

6 Attorneys for Plaintiff
7 NATIONAL ABORTION FEDERATION (NAF)

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 NATIONAL ABORTION FEDERATION
12 (NAF),

13 Plaintiff,

14 v.

15 THE CENTER FOR MEDICAL PROGRESS,
et al.,

16 Defendants.
17
18
19
20
21
22
23
24
25
26
27
28

Case No. 3:15-cv-03522-WHO

Judge William H. Orrick

**PLAINTIFF NATIONAL ABORTION
FEDERATION'S REPLY IN SUPPORT
OF APPLICATION FOR ATTORNEYS'
FEES FROM DEFENDANTS**

Date: March 27, 2024
Time: 2:00 pm

INTRODUCTION

In response to plaintiff National Abortion Federation’s (“NAF”) application for attorneys’ fees, Defendants The Center for Medical Progress, Biomax Procurement Services, LLC, and David Daleiden offer only a combination of unsupported evidentiary objections and legal arguments this Court previously rejected when it granted NAF’s prior motion to recover attorneys’ fees. Because their evidentiary objections are unfounded, and Defendants provide no explanation for why their recycled arguments should now be successful, this Court should grant NAF’s fee application for the reasonable attorney hours expended to successfully defend on appeal the permanent injunction this Court entered.

ARGUMENT

I. DEFENDANTS’ OPPOSITION REPEATS ARGUMENTS THIS COURT PREVIOUSLY REJECTED

Despite this Court’s prior ruling rejecting many of the same arguments Defendants make now to oppose NAF’s motion to recover attorney fees on appeal (ECF No. 765), Defendants attempt to resurrect some of these same failed challenges, in large part copying the same text from opposition briefs opposing NAF’s original motion to recover attorney fees before this Court, prior to appeal. (ECF No. 759.) These arguments are as misplaced now as they were when Defendants first made them and should again be rejected.

A. Defendants Fail To Refute That NAF Is Entitled To Recover Fees Incurred by Pro Bono Counsel on Appeal

As this Court held in its prior order, both statute and caselaw “compel the conclusion” that NAF is entitled to attorney fees even though it secured pro bono representation. (ECF No. 765, at 6-7.) Defendants, however, continue to insist that this Court rely on the same “out-of-state and out-of-circuit authorities” the Court already found unpersuasive. (*Id.* at 6; *see* ECF No. 814, at 2-3.) This Court correctly rejected Defendants’ assertion that “the losing party on a contract with an attorney fees provision should receive a windfall and avoid paying fees” simply because NAF was “fortunate enough to secure pro bono counsel.” (*See* ECF No. 765, at 6-7 (*citing Intl. Billing Services, Inc. v. Emigh*, 84 Cal. App. 4th 1175, 1193 (Cal. App. 3d Dist. 2000) and *Beverly Hills*

1 *Properties v. Marcolino*, 221 Cal. App. 3d Supp. 7, 11 (Cal. Ct. App. 1990)).) Defendants have
 2 provided no reason to abandon that reasoning now, simply because the fees NAF seeks here relate
 3 to defending the permanent injunction on appeal.

4 **B. Defendants Fail To Refute That They Have A Contractual Obligation to Pay**
 5 **Attorney Fees**

6 This Court also previously “easily disposed of” Defendants’ argument, which they
 7 reassert here, that NAF is not entitled to fees under the Exhibitor Agreements (“EAs”). (ECF No.
 8 765, at 8.) As this Court already held, the “EAs provided for both recovery of reasonable
 9 attorney fees to enforce the contract and for specific performance or injunctive relief.” (*Id.* (citing
 10 ECF Nos. 225-6, 225-7).) Defendants offer no new argument or rationale for why the Court’s
 11 prior ruling was wrong. It was not. This recycled argument fails as well.

12 **II. THE FEES SOUGHT ARE NOT EXCESSIVE**

13 In the Opposition, Defendants offer no objection to any particular line-item or billing
 14 method, limiting their challenge to the average hourly rates for partners and associates that NAF
 15 is requesting. (*See* ECF No. 814, at 4-5.) This Court, however, previously concluded that
 16 Morrison’s rates were reasonable “based on experience and prior billing rates.” (ECF No. 765, at
 17 9.) It should do so again.

18 Defendants also do not address the case law NAF cited in its brief, where numerous courts
 19 awarded attorney fees to comparable firms in this market where lawyers billed at comparable
 20 rates to Morrison’s attorneys. In fact, one of the cases on which Defendants rely, *Banas v.*
 21 *Volcano Corporation*, approved comparable rates for one of Morrison’s peer law firms in the
 22 market. 47 F. Supp. 3d 957, 966 (N.D. Cal. 2014).

23 The other cases Defendants present are readily distinguishable and in no way suggest that
 24 Morrison’s rates are somehow above market or excessive. Those cases involved matters with
 25 different procedural histories and complexities and different types of firms. Moreover, some of
 26 the cases on which Defendants rely dealt with rates from nearly a decade ago. In two cases, the
 27 court simply accepted that the requested rates—which in some cases the court recognized were at
 28 the lower end of the market—were reasonable; they did not define the appropriate market rate or

1 reduce awards that they determined were too high. *See Blue Growth Holdings Ltd. v. Mainstreet*
 2 *Ltd. Ventures, LLC*, No. CV 13–1452 CRB, 2014 WL 3518885, at *3 n.7 (N.D. Cal. Jul. 16,
 3 2014) (concluding that fees sought were “below or at the low-end” of the typical range; court
 4 noted rates over \$1,000/hour in a comparable major market, and recognized that “California
 5 courts have long relied on market values to determine reasonable attorneys’ fees”); *Vargas v.*
 6 *Berkeley Unified Sch. District*, No. 16-cv-06634-WHO, 2017 WL 5991857, at *2 (N.D. Cal. Dec.
 7 4, 2017) (court simply accepted the requested rates, which it noted were “heavily discounted” by
 8 that firm). The other two cases Defendants cite are similarly inapposite. *See Ward v. United*
 9 *Airlines, Inc.*, Case No. C 15-02309 WHA, 2024 WL 269149 *7 (N.D. Cal. Jan. 24, 2024) (court
 10 approved a *higher* rate than counsel would have charged, using a percentage-of-recovery method
 11 of calculation, and calculated loadstar merely for “rough” comparison to that rate); *Aguilar v. Zep*
 12 *Inc.*, 13–cv–00563–WHO, 2014 WL 4063144, at *4 (N.D. Cal. Aug. 15, 2014) (court noted that
 13 this was an employment case of “moderate complexity”). Defendants do not offer any
 14 compelling reason to reduce NAF’s fee application, let alone demonstrate why their disagreement
 15 with Morrison’s requested hourly rates would justify denying NAF’s fee request altogether,
 16 which is what Defendants ask the Court to do. (ECF No. 814, at 5.)

17 **III. DEFENDANTS’ EVIDENTIARY OBJECTION SHOULD BE OVERRULED**

18 Defendants object to the Blythe Declaration as “hearsay” but that objection lacks merit.
 19 First, not one case Defendants cite supports their assertion that the Blythe Declaration is hearsay
 20 and insufficient to support NAF’s fee application. For example, in *Muniz v. United Parcel Serv.,*
 21 *Inc.*, 738 F.3d 214 (9th Cir. 2013), the issue was the use of a reconstructed set of hours, rather
 22 than contemporaneous billing records. That issue does not exist here, where Morrison’s records
 23 were entered at the time the work was performed, as the declaration explains. (ECF No. 807-1
 24 ¶ 5.) Similarly, in *European Beverage Co., v. Manning*, 70 F.3d 1278 (9th Cir. 1995), the issue
 25 was not, as Defendants state, a “lack of ‘direct testimony,’” (ECF No. 814, at 1), but rather that
 26 the firm offered *neither* detailed direct testimony *nor* specific documentation of time expended, or
 27 costs incurred. The records submitted with the Blythe Declaration, by contrast, sufficiently
 28 document the hours worked by Morrison attorneys. (See ECF No. 807-1, Ex. 1.) Similarly,

1 *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983), merely stated that “[t]he party seeking an award of
 2 fees should submit evidence supporting the hours worked and rates claimed,” which the Blythe
 3 Declaration plainly does. (See ECF No. 807-1, Ex. 1.) Finally, *Yeager v. AT&T Mobility, LLC*,
 4 No. CIV S 07-2517 KJM GGH, 2012 U.S. Dist. LEXIS 179842 (E.D. Cal. Dec. 19, 2012), dealt
 5 with the very different situation where an attorney submitted a declaration concerning work done
 6 by a *prior* law firm, not other attorneys within the same firm.

7 Second, Defendants’ argument ignores the content of the Blythe Declaration. As set forth
 8 in the Declaration, as part of Ms. Blythe’s process for reviewing the fee request, she first asked
 9 the partner who supervised the appellate work to review all of Morrison’s time entries and do a
 10 “first cut.” (ECF No. 807-1 ¶ 4.) Ms. Blythe then performed a second and final review applying
 11 her own judgment as to the reasonableness of the request, as the partner who ultimately is
 12 overseeing the litigation before this Court. (*Id.*) The Declaration describes the method by which
 13 Morrison attorneys record their time (*id.* ¶ 5), and explains that Ms. Blythe reviewed all time
 14 notes selected for inclusion and, in her capacity as the most senior partner responsible for the
 15 overall litigation, ensured that the fees requested were reasonable (*id.* ¶ 4). As set forth in the
 16 declaration, Morrison’s actual fees were reduced appropriately, “to ensure that the present fee
 17 application represents only those efficient legal service hours reasonably expended on this
 18 appeal.” (*Id.* ¶¶ 4-5, 8.) The Blythe Declaration sufficiently demonstrates personal knowledge of
 19 timekeeping in this matter and provides adequate support for NAF’s fee application. Defendants’
 20 objection lacks merit and should be overruled.¹

21 CONCLUSION

22 For the reasons stated above, NAF’s application for attorneys’ fees from Defendants (ECF
 23 No. 807) should be granted.

24
 25
 26
 27
 28 ¹ While NAF does not believe it is necessary, should the Court have any concerns, NAF is happy
 to submit a supplemental declaration from an attorney on Morrison’s appellate team.

1 Dated: March 20, 2024

MORRISON FOERSTER LLP

2
3 By: /s/ Caitlin Sinclair Blythe
4 CAITLIN SINCLAIRE BLYTHE

5 Attorneys for Plaintiff
6 NATIONAL ABORTION FEDERATION
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that the foregoing PLAINTIFF NATIONAL ABORTION FEDERATION'S
REPLY IN SUPPORT OF ITS APPLICATION FOR ATTORNEYS' FEES FROM
DEFENDANTS is being served via the Court's ECF system on March 20, 2024, to all counsel of
record who are deemed to have consented to electronic service.

Date: March 20, 2024

Morrison & Foerster LLP

By: /s/ Caitlin Sinclair Blythe
CAITLIN SINCLAIRE BLYTHE

CAITLIN SINCLAIRE BLYTHE (SBN 265024)
CBlythe@mofo.com
KAREN LEUNG (SBN 323029)
KLeung@mofo.com
MORRISON FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Plaintiff
NATIONAL ABORTION FEDERATION